

FINAL DRAFT

PN-ACK-421

A STRATEGIC ASSESSMENT OF LEGAL SYSTEMS DEVELOPMENT IN COLOMBIA

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8 March 1993

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A STRATEGIC EVALUATION OF LEGAL SYSTEMS DEVELOPMENT IN COLOMBIA

EXECUTIVE SUMMARY

The nature of the study. This report, based on a four-week CDIE team field visit to Colombia in June-July 1992, constitutes the first country study of A.I.D.'s Legal Systems Development (LSD, more commonly known in the LAC region as Administration of Justice or AOJ) enterprise. Further field studies are being undertaken as well, with an overall evaluation synthesis anticipated in early FY 1994.

The central objective of the present study is to derive strategic lessons for the Agency's LSD program as part of its Democratic Initiative through assessing the LSD experience in Colombia. Thus while the report focuses on Colombia, it is **not** intended as a project evaluation of either the series of A.I.D. grants for LSD work in the 1986-91 period or the more formal judicial reform project that began in 1991. Moreover, in analyzing the LSD enterprise in the context of building democracy, this report is focusing on objectives that were not part of the original LSD design. Thus it is most definitely not a traditional project evaluation but rather a strategic assessment of LSD in Colombia.

Why Colombia? Colombia was selected for this first CDIE study for several reasons. The LSD program there is one of the oldest, is currently the largest in the Agency's portfolio and has the reputation of being highly successful. In addition, the level of host country commitment to LSD and the use of a non-governmental organization (NGO) as the principal implementor for most LSD activity made Colombia an appealing case study. Finally, the need for LSD in Colombia is perhaps greater than almost anywhere else; historically an extremely violent society to begin with, Colombia has in recent years been wracked by narcotics- and guerilla-related terrorism as well as much governmentally perpetrated human rights abuse. Clearly LSD had a challenge here; it was one the CDIE office thought well worth studying.

Host-country setting and USG policy concerns. The LSD environment in Colombia is easily sketched. First there is the epidemic violence mentioned above that has made homicide the leading cause of death in that country. Second there is the narcotics trade that has earned Colombia the position of being the world's leading cocaine processor and exporter. And third there is the justice system itself, which has been characterized by corruption, antiquated court administration (resulting in huge case backlogs), investigative incompetence, intimidation and assassination of judicial personnel, and widespread human rights abuses.

U.S. government (USG) concerns have focused primarily on the second of these three problems, the narcotics trade. American policy in the 1980s concentrated on extraditing drug lords and interdicting drug traffic. Extradition was eliminated in the new Colombian Constitution of 1991, however, and drug seizures, while

impressive in total tonnage, have failed to make more than a small dent in total exports. By offering the hope of combatting the narcotics trade through improving the justice system, LSD represents in effect a third approach to further USG policy objectives.

The LSD program. LSD in Colombia has had two stages. The first (called for convenience Phase I in this report) began in 1986 and consisted of a series of relatively small grants totalling \$2.7 million over five years to the *Fundación para la Educación Superior* (FES), which supported the following activities:

- Strengthening Public Order courts for terrorism cases, in which judges were protected with anonymity, armored cars, bodyguards and the like.
- Supporting court modernization, principally in administration, record keeping and case processing.
- Training in investigative techniques to upgrade GOC capacity in forensic skills (conducted by the International Criminal Investigative Training Assistance Program or ICITAP).
- Facilitating structural reform by providing a neutral arena for dialogue between A.I.D. and the GOC, as well as within the fragmented GOC justice sector itself. These structural reforms included some inputs into the new 1991 Constitution (the first since 1886).

For the second phase a formal A.I.D. project was designed, to provide \$ 36 million over a seven-year period beginning in 1991. Owing to various delays, however, the first substantial funding disbursement came only in late June 1992, and so this study is confined to Phase I.

LSD purposes and goals. Legal systems development has several program purposes:

- Efficiency - making the system perform more effectively in curbing terrorism and crime.
- Fairness and predictability - improving impartiality and the certainty that lawbreakers will be punished.
- Access - making the justice system available to the public.

Beyond its purposes, LSD has the principal goal of legitimacy, which in turn has three components:

- Credibility - public perception that the system is basically fair.
- Support - public observation of the law.
- Reliance - public use of the justice system to settle disputes.

Measurement issues. To assess program performance in the LSD sphere is not easy. For one thing the field itself is a new one in the development business, and thus there are no standard yard-

sticks available. And secondly there had never been any evaluation of the Phase I effort in Colombia, so there was little analysis on hand of a solid or rigorous nature. Still, it was possible to gather a great deal of evidence on the LSD enterprise in Colombia, including a considerable amount of quantitative information.

Program impact in achieving purposes and goals. In terms of efficiency, the Public Order courts have achieved significant progress in increasing their conviction rates in terrorism cases. Court modernization did well in its pilot experimentation stage, and the ICITAP training activity has developed and run several courses in forensic techniques. Most impressively, the efforts to promote structural reform bore fruit in the 1991 Constitution. It is, however, too early to say that justice has become "better," for there has not yet been any systematic review of Public Order court decisions, modernization is still in the pilot stage, improved forensic capability is only beginning to aid the criminal prosecution effort and the 1991 Constitutional reforms are only slowly having an impact. But a good start has been made.

Any assessment of fairness will have to await returns from the office of the *Procuraduría General*, which is charged with reviewing Public Order court cases for due process. Predictability seemed to be making improvements as these courts increased their conviction rates. Access to the justice system may improve greatly as alternative dispute resolution mechanisms prove themselves, but this process has only begun.

Credibility is reasonably easy to measure in Colombia, owing to the country's highly sophisticated public opinion polling capability. As can be imagined, opinion polls have indicated a very low credibility for the justice system, but more recent polls have indicated some improvement here. Support for a justice system is always hard to measure, owing to confusion between incidence of crime and reporting crime (one may be going down while the other is increasing). Nonetheless, the decrease in narco-violence after the inauguration of the new Constitution does indicate support for the reforms. Lastly, reliance on the new system will at best take some time to form and grow; it is as yet early days in this process.

Attribution. As with so much A.I.D. activity, attribution is always difficult to assess, principally because it is so hard to determine the extent to which donor assistance caused something to happen as against the likelihood that it would have come about anyway through host country support and thus the donor effort at most hastened things along. Despite this kind of uncertainty, it can be said that the LSD program can claim a good part of the credit for what progress has occurred in court modernization and investigative capability, some credit (along with the State Department's Narcotics Affairs Section) for the Public Order courts, and a significant though largely indirect credit for the structural reforms that have taken place in the justice system.

Recent setbacks for LSD. After the CDIE team departed from Bogotá in early July 1992, there have been three serious setbacks for the LSD program in Colombia. The first occurred on 22 July 1992 when the notorious drug baron Pablo Escobar escaped from prison under circumstances that made public and undeniable what had long been known, that his incarceration had been luxurious and that he had continued to direct the Medellín cocaine cartel while in prison. Then on 18 September 1992 one of the *jueces sin rostro* ("faceless judges") of the Public Order courts was assassinated in Medellín, confirming what had been widely suspected, that the elaborate protection system organized for these courts was penetrable. Lastly, in early November the two major guerrilla groups, which had been negotiating an accord with the GOC, launched a series of attacks, thereby provoking the president to decree a state of emergency and bringing into doubt the GOC's ability to deal with guerrilla terrorism.

The cumulative effect of this series of events was to place the whole LSD enterprise, which up to this point had shown considerable progress, under a serious cloud. All is not lost, to be sure, but the challenge will now be much harder, particularly in building public confidence that the GOC can get control of public order in the country. The lesson for A.I.D. would seem to be that not only is LSD a sensitive area to work in but it can also be a precarious one, vulnerable to sudden reverses from the wider political arena of the host country.

Key issues for LSD. Stemming from the CDIE review of LSD in Colombia, there are several key issues that relate to A.I.D.'s overall enterprise in this subsector of its Democracy Initiative. The principal issues are as follows:

- Supply and demand. Should LSD focus more on improving the justice system itself (the supply side) or on enhancing access to that system (the demand side)? The Colombian program has focused almost exclusively on the supply side, which can be justified on the grounds that demand was already there from a citizenry alarmed by terrorism and a political elite determined to reform the justice system in order to combat it. In other countries where conditions are less severe, more attention to the demand side will likely be needed.
- Incremental vs structural reform. Can legal systems be improved bit-by-bit in an incremental fashion, or is fundamental reform needed to bring about any significant advancement? In Colombia the problems of violence, narcotics and a decrepit, corrupt justice system were too profound for an incremental approach to have accomplished anything of significance. Elsewhere there is likely to be a good deal more choice.
- Judicial efficiency and human rights. These two qualities are in theory not only compatible but mutually reinforcing. In practice, however, a criminal justice system can become more "efficient" simply by convicting more people faster; such

added productivity may well come at the expense of human rights and due process, especially in places with a history of serious human rights violations. Could the Colombian human rights situation deteriorate as the Public Order courts with their anonymous judges and witnesses markedly increase their conviction rates? The CDIE team found no indication that this has been the case, but a first-level judgment on the matter will have to await the thorough review of Public Order cases that the office of the *Procuraduría General* is supposed to be making. Certainly there are serious potential risks to human rights involved here, and the same must be anticipated in other countries also as justice systems attempt to increase their efficiency.

- Convergent agendas vs conditionality and dialogue. The principal USG priority in Colombia of late has been its counter-narcotics effort, while the GOC's major ambition has been counter-terrorism. Fortunately the two agendas converged on the need to combat narco-terrorism, which became a central focus of the LSD enterprise. Accordingly, USG-host country policy dialogue and aid conditionality did not have to be heavily employed as part of the American LSD approach in Colombia. In other situations, this degree of convergence will probably not be realized in this sphere which is so central to a country's core political structure. What should be the place of dialogue and conditionality there?
- Host-country NGOs vs other project implementors. The role of FES as an NGO intermediary between A.I.D. and the GOC was such a key factor in the Colombian LSD endeavor that the question should be more widely asked about what should be the place of NGOs more generally in LSD initiatives. Was the Colombian situation peculiar to that country, or can broader conclusions be suggested?

As the CDIE evaluation process continues in this sphere, becoming deeper and richer, these issues will be explored, modified, amended and expanded.

ACRONYMS AND ABBREVIATIONS

A.I.D.	U.S. Agency for International Development
AOJ	Administration of Justice
CDIE	Center for Development Information and Evaluation
DEA	Drug Enforcement Agency
ELN	<i>Ejército Popular de Liberación</i>
FARC	<i>Fuerzas Armadas Revolucionarias de Colombia</i>
FES	<i>Fundación para la Educación Superior</i>
FY	Fiscal year
GAO	United States General Accounting Office
GOC	Government of Colombia
ICITAP	International Criminal Investigative Training Assistance Program
JSRP	Judicial Sector Reform Program (formal name for Phase II of the LSD program in Colombia)
LAC	Bureau for Latin American and Caribbean
LSD	Legal Systems Development
LOP	Life of project
M-19	<i>Movimiento de 19 de Abril</i>
NAS	Narcotics Affairs Sections, Office of International Narcotics Management (U.S. State Department)
NBCCA	National Bipartisan Commission on Central America
NGO	Non-governmental organization
USAID	U.S. Agency for International Development
USG	United States Government

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Introduction

This short analysis, based on four weeks' work in Colombia during June-July 1992, represents the first of a number of field studies of A.I.D.'s Legal Systems Development (LSD) efforts,¹ now being conducted by the Center for Development Information and Evaluation (CDIE).² A second study took place in Honduras in August-September 1992, and further analyses will be undertaken in 1993, culminating in an evaluation synthesis in early FY 1994.

The present report will begin with a brief depiction of the background and judicial environment in Colombia. Second it will outline the Agency's LSD enterprise there and inquire what has happened in terms of impact and measurement: what has LSD done for the Colombian justice system and how can this be gauged? Third, it will address the attribution issue: when program purposes have been realized, to what extent can these improvements actually be credited to A.I.D. activity?

The fourth section will present a number of lessons and issues distilled from this CDIE study that relate to LSD efforts elsewhere, both in the LAC region and globally. These lessons and issues are framed so as to pose critical strategic questions that can help guide the Agency's LSD enterprise in the 1990s.

It should be stressed at the outset that this assessment is emphatically **not** intended as a project evaluation of the LSD effort in Colombia. Rather it is intended as an assessment of

¹ The term Legal Systems Development comes from the A.I.D. Administrator's Evaluation Agenda (USAID, March 1992) and includes the older Administration of Justice (AOJ) program originating in the Agency's LAC Bureau. In the present report the LSD terminology is used, emphasizing that this study is part of a worldwide CDIE evaluation endeavor.

² An initial report appeared as a draft document written by the CDIE team members, "The A.I.D. Legal Systems Development Program in Colombia," dated 14 August 1992. The present report is based in large part on that longer and more comprehensive document, which lays out the background, methodology and findings in more detail.

The team conducting the field study wishes to acknowledge its thanks in particular to James F Smith, then the A.I.D. Representative in Bogotá, Ana Maria Salazar of the A.I.D. office there, Al Ortiz of the ICITAP program in Bogotá, Adela Morales and Cesar Solanilla of FES, and Hernando Valencia Villa of the law faculty at the University of the Andes. Thanks for their comments and criticisms are also due to the participants at a legal systems workshop held at Development Associates in Arlington, Virginia, on 18 February 1993. All responsibility for this report, however, lies with the authors.

the Colombia program's implications for the Agency's endeavors in the LSD sphere and its Democracy Initiative more generally. This is the central purpose of the successive LSD field studies currently being undertaken by CDIE, of which the present effort is the first.

Moreover, it should also be pointed out that, in focusing on the role of LSD in building democracy, this report analyzes an objective that was not a part of the original LSD effort in Colombia, although it is certainly a fundamental part of USAID strategy in Latin America and Colombia today. If this assessment were a traditional A.I.D. project evaluation, it would of course be quite inappropriate to assess an activity in terms of a quality it was not originally designed to promote. But it is not a project evaluation giving "grades" on project achievement; instead it is an strategic assessment seeking *inter alia* to fit LSD activity in Colombia into the larger context of the Agency's Democracy Initiative.

Why Colombia?

There are several reasons why Colombia was selected as the site for CDIE's beginning field study.

- The LSD program there is one of the Agency's oldest (having begun in 1986) and is currently the largest (with a six-year, US\$ 36 million effort now in progress) within A.I.D.'s total portfolio of LSD efforts.
- The Colombia program has gained a reputation within the Agency as an enterprise highly successful in inducing fundamental reforms in the host-country judicial sector.
- The host-country need for LSD support is arguably greater than for any other current A.I.D. recipient. For many decades an exceedingly violent society to begin with, Colombia in recent years has suffered additionally from a prolonged wave of narcotics- and guerrilla-inspired terrorism, along with much police and military brutality accompanying the GOC's response to that terrorism. And of course there has been the narcotics industry itself that has made Colombia the world's leading cocaine exporter and has become the major focus of USG policy there.
- The LSD program there has been characterized from the outset by at least two critical factors that would seem to carry strong implications for LSD success elsewhere: the use of a non-governmental organization (NGO) as managing intermediary for the program; and a very strong host country commitment at the highest level to reforming the justice system.

Methodology of the study

The CDIE team consisted of two social scientists (Harry Blair of CDIE, who served as the team leader, and William Millsap of Development Associates) and two lawyers (Arthur Mudge and Mary Staples Said, both of Development Associates). As a team, we spent four weeks in Bogotá during June-July 1992 analyzing the Colombia LSD program.

The approaches employed. The methodologies used consisted primarily of the following:

- An extensive document review, both at the A.I.D. representative's office and at the *Fundación para la Educación Superior* (FES), which administered most of the program support and which had maintained an extensive set of notes, minutes, drafts and reports. In addition, a good many GOC reports and documents were collected.
- Interviews with GOC and USG personnel, as well as Colombians outside the government sector. Almost all of the interviews included at least two CDIE team members meeting with one or two respondents.
- Focus groups consisting of lawyers and justice system personnel.
- Site visits to the court modernization project in Bogotá.³

Study limitations. LSD is a relatively new undertaking for A.I.D., dating back only to the mid-1980s, when it began as part of the Agency's Central American activities attendant upon the Caribbean Basin Initiative. Partly because of this recent origin and partly too because the nature of justice itself has always been exceedingly difficult to define and measure, there are no standard yardsticks available to gauge progress as there are for example with child survival or family planning efforts.⁴

³ Unfortunately, owing to security concerns at the U.S. Embassy, it was not possible to make any visits outside Bogotá, most particularly to the main LSD pilot court modernization experiment at Itagüí, a town near Medellín. It was possible, however, to recruit an independent Colombian legal expert to conduct a short field study of the Itagüí effort.

⁴ It is worth recalling here that Western philosophy has been debating the definition of justice and how to obtain it at least ever since Plato's *Republic*, which dates from the 4th century B.C.E. It should not be surprising that in the late 20th century C.E. one finds A.I.D. still looking for ways to measure justice.

In terms of specific justice indicators like crimes committed, case overloads, and the like, there are of course many measures, such as those developed by the *Instituto SER*, which has been conducting studies in this area for many years (cf. Giraldo et al. 1987; Veléz et al. 1987). On the larger (and

A second limitation stems from a lack of A.I.D. project evaluations to date.⁵ Because there had never been an evaluation of the original series of grants that formed the first phase of the LSD program in Colombia, and because the formal LSD project comprising the second phase had just gotten started at the time of the CDIE team's visit, there was little in the way of quantitative data available to measure LSD progress.

Still, it was possible to discern and analyze the LSD enterprise in Colombia and to gather considerable quantitative data along the way, as will be apparent in section II of this report.

I. Background and Policy Environment for LSD

Any donor-assisted program operates within a context, which must be understood to some degree if the program itself is to be analyzed with any accuracy. In this section, the situation faced by the justice sector will be described, along with the USG response apart from LSD.

The justice sector environment

Colombia is accurately labeled an "advanced developing country." It enjoys a per capita income of about US\$ 1200, and has had a reasonably steady growth rate over the past quarter-century, averaging around 3-5% yearly per capita in real terms, consistently better than the Latin American average. Poverty is a serious issue in Colombia, with roughly 40% of the population living in "absolute poverty" as of the mid-1980s, according to the GOC's estimates. As might be expected, income distribution is quite skewed, though the share of the bottom decile appears to have increased slightly during the 1970s and early 1980s.

In terms of "physical quality of life" measures, the country ranks highly, with a life expectancy of 69, an infant mortality of 39 per thousand and an adult literacy of 85%. Moreover, Colombia has been a functioning democracy (albeit an elite-dominated one) for several decades now, despite a number of extremely severe problems tearing at the political fabric of the country.⁶

ultimately more important) issues like the quality of justice, however, we still grope with the questions Plato posed.

⁵ The closest thing to a project evaluation has been a GAO report (GAO 1992), which proved most helpful, though it did not become available until after the CDIE team had returned from Bogotá.

⁶ Data in these two paragraphs are from World Bank (1992) and USAID (1992), except for the poverty and income data, which are taken from World Bank (1990).

The political challenges facing Colombia can be summed up under three related headings. First there is the epidemic violence that has made homicide the leading cause of death for citizens of all ages, ahead of cardio-vascular ailments, pulmonary causes, cancer, malaria, etc.⁷ In the recent years, guerilla armies have roamed the countryside, while narco-terrorists and death squads have terrorized the urban areas. Perhaps the most telling indicator of violence is the current ubiquity of *sicarios*, young assassins for hire who will take on murder assignments for as little as US\$ 100 or even less. The general atmosphere is one often referred to as *la impunidad*, in which the perpetrators of violence have been able to carry out their will with virtually no risk of punishment.

The second problem area is the narcotics trade. Although not a major coca leaf grower, Colombia has for some time been the major cocaine processor and exporter, earning a net return from the cocaine trade estimated at \$US 3.5 billion in the mid-1980s, well over twice the earnings derived from coffee, which is the country's main legitimate export.⁸ In the early 1990s, the narcotics trade began to turn to poppy cultivation and heroin also, as drug preferences in the North American market showed signs of change.

A third serious problem is the justice system itself, which by the mid-1980s had shown itself manifestly unable to deal with the combined assaults on law and order that came from guerilla groups, narco-traffickers and ordinary crime in Colombia.⁹ Several aspects of this inability in particular stood out:

- Rampant corruption in all sectors of the justice system severely impeded its effectiveness, contributing greatly to the environment of *la impunidad*.
- Judicial assassinations had become endemic, particularly in cases involving narco-traffickers. Between 1980 and

⁷ In 1990, the homicide rate in Colombia was 70 per 100,000 inhabitants, more than six times the rate in the United States (11 per 100,000). See Uprimy (1992: 3). For 1991, one figure reported for Colombia was 88 per 100,000 (see Speck 1992a). Violence has long been an intimate part of Colombian history, it should be noted, since the nineteenth century, periodically erupting into civil war, as in the War of a Thousand Days at the turn of the century and the long period of strife known simply as *La Violencia* in the mid-twentieth century, which is estimated to have cost some 300,000 lives (for an account of violence in Colombia's past and present, see Hanratty and Meditz 1988: esp. 18-55 and 253 &ff.; for the present period in particular, see Osterling 1989: 261-335).

⁸ For a detailed though succinct analysis of the narcotics trade in Colombia, as well as the problems in dealing with it, see Lee (1992).

⁹ Two short but incisive analyses are Armstrong (1989) and USAID (1989). For more thorough assessments, see Giraldo et al. (1987) and Vélez et al. (1987). Except where noted, the material in this section of the text derives from these sources.

1990, more than 250 judicial personnel (including even cabinet officers) had been assassinated, producing an atmosphere of fear and intimidation in the judiciary.

- Investigative capacity was ineffective and rudimentary, so that even when officials in the system attempted to process criminal cases it was difficult to develop the necessary evidence.
- An antiquated court system, using procedures unchanged for many decades, had accumulated a huge backlog of cases, such that not more than one case out of five entering the system had any hope of being resolved.
- The state was a major perpetrator of human rights abuses, as is amply indicated by outside analyses as well as the GOC's own evidence.¹⁰ Both the military and the police (staffed in the lower ranks mainly by poorly-trained conscripts) have had a long history of unjustified homicides against civilians, torture under arrest and arbitrary detention, all of which has been aggravated greatly in recent years under guerilla and narcotics-related attacks.

By the end of the 1980s, it had become clear that the system was in deep crisis and perhaps on the verge of breakdown. Narco-traffickers had joined guerrillas and paramilitary death squads in terrorizing the citizenry and had directly threatened the political system itself, assassinating several presidential candidates in the 1990 campaign. In particular, Cesar Gaviria Trujillo, who won the 1990 presidential election, was in fact a substitute candidate, picked by the Liberal Party after Luis Carlos Galán, its major contender for the nomination, was assassinated in 1989. If there were ever a time when Colombian society, which had historically shown itself capable of tolerating quite high levels of violence, was ready for restructuring its judicial system, this was likely to be it.

The USG response

As the 1980s progressed, American society and concomitantly the USG became increasingly concerned with illegal drugs, particularly cocaine and its derivatives like crack. Fueled by pressure from the public, from Congress and from the White House, the USG made a counter-narcotics effort the principal focus of its policy toward Colombia, pursuing two basic strategies. The first approach was interdiction, promoted by the Office of National Drug Control Policy through the Drug Enforcement Agency and the State Department's Narcotics Affairs Section. This enterprise

¹⁰ See e.g. the Colombia section in the U.S. State Department's yearly human rights reports or in Amnesty International's yearly reports; also GOC, Procuraduría General (1991).

did make some headway, and cocaine seizures climbed to a record 65 tons in 1991. But viewed against an estimated 500-700 tons of Colombian cocaine shipped to North American and European consumers each year, such achievements fell far short of seriously impeding the overall drug flow.

The other approach was extraditing major narco-traffickers to the United States for trial. A number were extradited in the mid-1980s, but then the Colombian Supreme Court declared the practice unconstitutional in 1987, and, although it was reinstituted in 1989, extradition was eliminated in the new 1991 Constitution. In sum, then, neither of the USG's two principal counter-narcotics strategies proved in the end very satisfactory in stemming the cocaine flow. Other approaches were needed as well, and the Agency's LSD program proved to be one such approach.

An earlier strand in the LSD effort derives from the USG response to the Central American situation in the mid-1980s. The egregious human rights abuses and antiquated judicial systems there became a focus of the USG effort in the region in the form of the Administration of Justice program, which in turn formed a part of the backdrop for the Colombian undertaking in the later 1980s (see NBCCA 1984: esp 13, 51, 61; also U.S. State Dept et al 1987: 8).¹¹

II. The A.I.D. program in Colombia

Thus far there have been two LSD phases: first a series of grants totalling about US\$ 2.7 million over the 1986-91 period (here referred to as Phase I) and then a much larger project (Phase II) of US\$ 36 million beginning in 1991. For various reasons, little of the Phase II money had actually been committed by the time of the CDIE field study in June-July 1992, so the present analysis will deal essentially with Phase I, a large part of which was implemented through grants to the *Fundación para la Educación Superior* (FES), a well-established NGO in Colombia. But despite its modest expenditure Phase I had very considerable effects on the Colombian justice system, with the result that an evaluation of LSD in that country offers a rich fare of findings that can inform and guide the future assessments that CDIE has planned for the Agency's LSD enterprise in the LAC region as well as elsewhere.

¹¹ Even before the Central American crisis came A.I.D.'s Law and Development program in the late 1960s, which did field some activity in Colombia, particularly in the area of legal education (see Gardner 1980: ch. 8). But this earlier undertaking had little if any connection to A.I.D.'s LSD activity in the 1980s.

Phase I LSD components and achievements

The LSD program in Colombia had five principal components in its first phase, all of which posted some achievements of note.¹² In its major contributions the Phase I A.I.D. effort:

- supported the Public Order courts, which have been charged with handling narco-trafficking, terrorism and related cases, and in which convictions from 30 to 70 percent in the 1991-92 period (this activity absorbed about 13 percent of Phase I funds);¹³
- funded a pilot court modernization project in Itagüí (a suburb of Medellín) which reduced court backlog by almost half, as well as less thoroughgoing modernization efforts in a larger number of appellate courts (about 31% of Phase I funds);
- backed training (provided by the International Criminal Investigative Training Assistance Program or ICITAP) that has produced greater GOC competence to manage the criminal justice system in several areas; most notably the government's investigative capability has improved (about 11%);
- supported the creation of a corpus of knowledge for improving the justice system through analytical research on LSD (about 20%); and
- financed lesser project activities in other areas, mainly improving the jurisprudential base by furnishing legal material to judges' libraries and promoting a national network for jurisprudence (6%).¹⁴

The principal impact of Phase I, however, was in a direction quite unanticipated in the initial grant agreement and never directly addressed as such in successive amendments to that agreement. This was its influence on restructuring the justice system in Colombia that culminated in the new Constitution of 1991, its first thorough revision since 1886. The A.I.D. contribution here came along two lines:

¹² These program components are described in more detail in Blair et al. (1992).

¹³ In an attempt to deal with the intimidation and assassination of judges that had become so widespread (particularly in narcotics-related cases), the Public Order courts featured physical protection (including armored cars and bodyguards) for anonymous judges who appeared in court behind one-way glass with voice-distorting microphones, as well as anonymous witnesses and evidence.

¹⁴ The remaining 19% of project funds went to administrative costs, office improvement and designing the Phase II follow-on project.

- Reform facilitation. The *Comité Asesor* (Advisory Council) at FES, which was actually designed to bring together the main figures in the justice sector to approve subproject grants, also served as a neutral arena in which these major players (who had previously been quite isolated from one another with each tending to his or her own judicial bailiwick) could meet to develop other ideas as well. With the steady but careful encouragement of the A.I.D. representative in Bogotá, they were able to relate to each other both personally and institutionally, discuss common problems and begin to formulate agendas for reform that would eventually lead to the new Constitution.
- Constitutional reform. After assuming office in the summer of 1990, President Cesar Gaviria launched an effort to rewrite the Constitution, a process in which the LSD project turned out to play a significant role, in the form of many former FES employees and Advisory Committee members assuming various roles in the rewriting process as well as in furnishing drafts of several sections of that document. Among the many reforms enacted in the new Constitution, the two most significant from the LSD standpoint are the creation of the *Fiscalía General* (which hives off the prosecutorial/investigative function from the judges) and the strengthening of the *Procuraduría General* (which is charged with investigating rights abuses and corruption).

Phase II components

The first phase, with its series of small grants mostly channeled through FES, in many ways served as a lengthy rolling design stage for Phase II — a formal A.I.D. project entitled the Judicial Sector Reform Project (JSRP), approved in August 1991 for US\$ 36 million. The new project has three major activity components, as outlined in Table 1, and constitutes one of the two major initiatives now being pursued by the A.I.D. office in Colombia (with the other being an economic liberalization effort). For various reasons, implementation of Phase II has been delayed somewhat, and in fact the first substantial disbursement to FES as the managing agent for much of the project's activity came only in late June 1992.¹⁵ In the course of getting started, it was determined to postpone some of the project's components until the third and fourth years, as shown in Table 1. Most notably, it was decided to put off those components dealing with the demand side of the justice system while retaining those addressing the supply side. Thus public awareness aspects, the public de-

¹⁵ The GAO evaluation reported a significant disbursement in March 1992 (GAO 1992: 5, 10), but the CDIE team was given a June date. In either event, there had not been sufficient Phase II activity to assess by the time of the CDIE team's visit.

fender's office and private sector participation were all postponed, but support for the Public Order courts, court modernization and the like were kept in the program from the start.

Because Phase II was only getting under way at the time of the CDIE team's visit, this report will be restricted to analyzing the effects, impact and implications of Phase I. But as should be clear already, and will become more so as this report proceeds, the first LSD phase in Colombia was sufficiently rich in its coverage and texture to afford ample material for an in-depth analysis.

TABLE 1
COLOMBIA JUSTICE SECTOR REFORM PROJECT
PROJECT COMPONENTS

Major components	Subcomponents included in first two years		Subcomponents deferred until 3rd & 4th years	
	Subcomponents	Details of Outputs	Subcomponents	Details of Outputs
ORGANIZATION, PLANNING, MONI- TORING (14% of project funding)	Restructure institutions	Draft organizational plans, regulations, action plans	Public perception	Press offices, mass media
	Planning	Prepare plan, strengthen planning	Public education	Design program, train trainers
	Unified information & research	Information system, research		
	Monitoring & evaluation	Institution & personnel performance		
	Protection	Design threat assessment unit		
	Further analyses			
INVESTIGATION & PROSECUTION (33% of project funding)	Public order jurisdiction	Protection, forensic training & equip, admin, coord, info re organized crime	<i>Defensor del Pueblo</i>	Strengthening
	<i>Instrucción Criminal</i> (other serious crimes)	Pilot activities, admin, training judges & police, forensic TA & equip, victim/witness support	Private sector participation	Private defense counsel, law faculties, bar groups
	<i>Fiscalía General</i>	Creating the office		
	<i>Procuraduría</i> oversight	Training <i>fiscales</i> & investigators, support internal control		
OPERATION OF THE COURT SYSTEM (44% of project funding)	Designing <i>Consejo Superior de Administración de Justicia</i>	Organizational design	Providing legal information to courts	Designing a system for timely dissemination
	Strengthening <i>Consejo Superior</i>	Manuals, info system, planning & evaluation	Building morale & dedication of judges	Explore new approaches
	Internal court support services	Build systematization, common support services		
	Strengthen Judicial School	Issues analysis, improve training		
	In-service training for court personnel	Support Judicial School		
	Foster conciliation	Support new conciliation centers		

Sources: USAID, Colombia JSRP Project Paper (August 1991), 25-55; and (2) Bloom, Peter, Information memo to AA/LAC re: Colombia Project Paper for Improved JSRP (19 June 1991), 5. Administrative costs were to absorb the remainder of project funding.

LSD measurement problems

How can the achievements of Phase I be measured? Some project accomplishments can be measured very straightforwardly, while others are much more elusive. To take two of the activities mentioned above, it would be easy to count the number of books contributed to judges' libraries or the quantum of studies sponsored through FES, but neither of these statistics are very meaningful in assessing impact, for we don't know from numbers alone whether the judges used the books or whether the studies were of any value.

With the library volumes, the lack of knowledge amounts to only a minor vexation, since this was only a small project activity (around 6% of project allocations). As for the studies, however, not only did they constitute a higher portion (about 20%) of the Phase I budget, but some of the research sponsored clearly had a major intellectual impact on subsequent reform initiatives, as with the studies on alternative dispute resolution mechanisms. Measuring the precise degree of impact for each individual study, however, is virtually impossible. Fortunately, most of the activities undertaken by LSD are easier to gauge in terms of impact than the studies, though still they present considerable measurement difficulties.

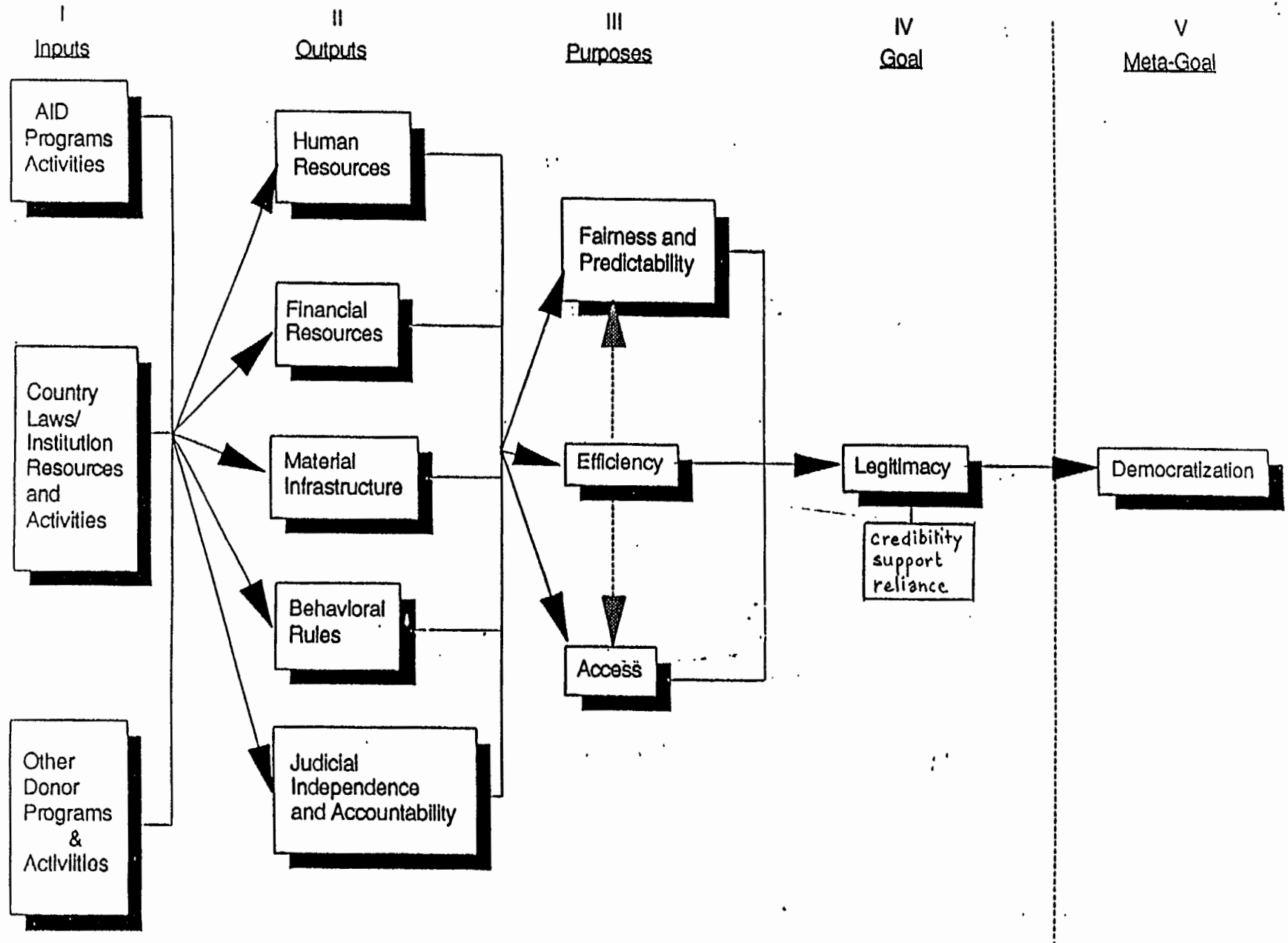
Measuring achievement of program purpose and goals

In this section four LSD program purposes and as well as its goal will be analyzed (cf. Figure 1).¹⁶ The **purposes** are:

- efficiency – in what ways does the criminal justice system perform better? what is meant by "better"?
- fairness and predictability – has the justice system in fact become more impartial? can citizens (and especially potential lawbreakers) predict more clearly that the system will sanction proscribed behavior?
- access – has the criminal justice system become more available to the public? what of legal representation? have alternative dispute resolution mechanisms promoted wider access?

¹⁶ Figure 1 and the accompanying discussion in the text of this essay represent a brief and somewhat modified version of the much more detailed LSD research design that is laid out in Hansen et al. (1992). This design was drawn up prior to the first CDIE field study in Colombia and was intended as a first iteration rather than as a blueprint; it was anticipated that the CDIE study team would want to modify the design as the field studies proceeded, and the account given here in Figure 1 and the text constitutes a second iteration. This iterative process will continue as the LSD evaluation advances.

Figure 1: Model of Democracy and Legal Systems Development



And the goal is:

- legitimacy, which in turn has three components:
 - ▣ credibility – do people perceive the justice system to be fair and predictable in deterring crime?
 - ▣ support – do citizens support the justice system by obeying the law? what is the incidence of crime?
 - ▣ reliance – do citizens actually use the justice system (e.g., instead of *sicarios*)?

The first three of these entities are included in the CDIE legal systems logic model as program purposes (element III in Figure 1), which should be expected to result from the operation of the human resources, financial resources, material infrastructure and behavioral rules that were created or upgraded through LSD activity in Colombia.¹⁷ These three program purposes in turn should be expected to lead to realization of the program goal of greater legitimacy (element IV) for the justice system as a whole. And finally, enhanced legitimacy (reflecting an improved justice system) will lead to further consolidation of democracy (element V) in Colombia – the "meta-goal" of the overall LSD enterprise.

Each of the factors listed above will be analyzed in terms of the major areas in which LSD achievement can be pointed to, i.e., the Public Order courts, court modernization (especially in the Itagüí pilot project), enhanced investigative capability provided through training, deepened knowledge stemming from research, improved jurisprudential base and structural reform.

Efficiency. Of all the LSD activities taken up thus far, certainly the most straightforwardly measurable is the Public Order courts, where the statistics available indicate a greatly enhanced efficiency in obtaining convictions. From a conviction rate of around 30% before the reforms for narco-trafficking and terrorism cases, these courts in 1991 convicted 487 of 696 defendants or 70.0%. For the first four months of 1992, the rate was even a bit higher at 162 out of 217, or 74.7%. But from these data alone we know nothing of the quality of decisions rendered, nor do we know how well defendants' rights were observed. Such issues are "empirical" in the sense that they could be determined through an investigation of court records, but the CDIE study team was not able to delve into that level of detail during our field visit to Colombia. Thus we cannot estimate

¹⁷ As noted in Figure 1, these purposes result from successful project outputs (element II), which in turn derive from inputs (element I) provided by donors and the host country. This CDIE assessment, however, has carefully avoided a detailed analysis of elements I and II, which is the province of project evaluation. In the present study, the focus is consciously set at a more strategic level.

whether the Public Order courts were really operating "better" or merely more sternly.¹⁸

In foreign assistance terms, when one totals all American assistance from the various USG agencies (e.g., including the judicial protection program from the Narcotics Affairs Section (NAS) of the State Department, intelligence exchange through the Drug Enforcement Agency (DEA), etc.), there is probably no doubt that the total cost (when all USG spending is aggregated) per conviction has greatly increased, even with the much higher rate of convictions. The same is surely true of the GOC, in view of the considerable investment it has had to make in elaborate security arrangements for court personnel and physical facilities. But then if "costs" are considered to include the devastation to American society from narco-trafficking and the disruptions to Colombian society from narco- and guerilla-related terrorism, and if "benefits" are considered to include reductions on both counts, then the Public Order courts may well prove to be very efficient indeed. Accomplishing high-priority and high-profile public policy goals - curbing drug traffic for the USG and reducing terrorism for the GOC - are after all worth considerable investment.

Assessing efficiency in the court modernization endeavors is also hard in a study like this one, but for different reasons, mainly that no serious evaluation has been done so far within the context of the LSD effort in Colombia. To some extent, of course, the CDIE team was able to do its own evaluating, but to have done a thorough analysis of, say, the modernized appellate courts would have taken more time than the team had available, and even to have visited the most important part of this effort - the pilot project at Itagüí - was not feasible because of USG security concerns. It did prove possible to engage a Colombian law professor to visit Itagüí, who gathered valuable data and contributed worthwhile insights to the CDIE study, but this wasn't really the same as a direct team visit would have been. So while we can say that the 48% case congestion reduction at Itagüí indicated significantly increased efficiency, we do not have the depth of understanding that a direct visit would have afforded.

For the rather less ambitious pilot *sistematización*¹⁹ efforts underway at other courts, there is rather less evidence of what

¹⁸ The *Procuraduría* is charged with overseeing due process in all criminal cases, and there is within the regular court structure an appellate system to review decisions, so at some point in the future (after the 1991 and 1992 cases have had a chance to percolate through the judicial corrective process) it might be possible to retrospectively assess whether quality had increased or decreased along with the conviction rate, but that sort of determination cannot be made at present.

¹⁹ This is a current "buzz word" in Colombian justice system circles, meaning essentially computer automated record systems combined with improving court management procedures.

might be called sustainable efficiency so far, in view of the lack of planning, training and even simple file backup procedures that have characterized the enterprise to date. And of course the absence of any serious A.I.D. evaluation of these effects also impedes analysis. Presumably the benefit/cost ratio will eventually be high for the court modernization effort, as *sistem- atización* spreads through the entire court system, but in the initial pilot phase itself, it is reasonable to suppose that - as is typically the case in these matters, owing to the cost of experimentation and intensive management that is always necessary during the initial phases - the ratio is quite low, perhaps even less than unity.

Training is perhaps the easiest of all project outputs in the foreign aid business to measure in a crude quantitative sense, for one need only count the number of persons trained. But it is notoriously difficult to assess its impact, in terms of whether any new knowledge is actually imparted, proves relevant to student needs, gets used, or produces worthwhile results even if it is used. Initially the LSD investigative training experienced some problems with relevance (what had worked for ICITAP in Central America was less applicable to Colombia) and utilization (too many students used the course as a credentialling tool to get promoted to positions where the new knowledge could not be employed), but much of this got ironed out over time, and it now appears that much of the training is getting used. As of June 1992, the ICITAP effort had trained some 500 investigators in forensic techniques. Whether this will lead to better investigation resulting in better prosecution (which would be the best test of efficiency) remains to be seen.²⁰ In a word, then, training's efficiency in terms of benefits relative to costs cannot yet be estimated. All we can say at present is that the necessary groundwork for building an effective investigative system has been laid.

The efficiency of structural reform in the justice sector is also hard to deal with. Major changes have been effected, albeit at high expense to the Colombian political system, for rewriting a national Constitution, especially one as old as Colombia's was, exacts a very large cost, not necessarily monetarily but rather in terms of political capital, public energy and national psychic commitment to the effort. Will that investment pay off? Even a decade may be too soon to tell whether the justice system's new path will prove worth while.

Fairness. The familiar American depiction of Justice as a blindfolded figure shows dramatically the importance accorded to fairness and impartiality as a critical component of the justice system. Has LSD promoted greater fairness in the Colombian

²⁰ It should also be remembered that better prosecution will also hinge in large part on how well the new *Fiscalía* (prosecutorial) office functions, a factor which will make it difficult analytically to isolate the impact of investigative training.

system? The most that can be said at present is that LSD has been and continues to contribute to creating conditions which in turn should lead to greater fairness; it cannot be shown that fairness has in fact increased. As mentioned above, we don't at present really know if the higher rate of convictions in the Public Order courts has been accompanied by greater quality in judicial decisions, though certainly the enhanced protection provided to judges has the potential to contribute greatly to that end by freeing them from the intimidation that had become so endemic in terrorism cases. At the same time, the special provisions in effect in these courts like anonymous witnesses and evidence raise increased risk to due process and human rights, a matter that will be taken up later on in this report.

Nor do we know if court modernization has led to more fairness at Itagüí and elsewhere, although some of the LSD outputs recorded thus far should help in this direction; a reduced backlog should allow judges more time to devote to their cases, and more interaction with other judges (another outcome in the pilot effort at Itagüí) should provide more perspective to their decisions. Court modernization should also help greater procedural standardization, which is another aspect of fairness, by facilitating access to a complete range of records and past judgments, particularly as computerized databanks of court decisions and doctrines come on line in Phase II.²¹

Similarly, the improved investigative capacity created by A.I.D.-supported training should make for better investigations, which would in turn serve as part of the foundation for making fairer court decisions. Making more accurate forensic information available to a judge will not necessarily lead to fairer court results, but it would certainly make fairer decisions possible.

Some of the structural reforms fostered through the new Constitution should lead to more fairness. The A.I.D. role in creating these structural reforms was a modest one, to be sure, but as noted above it was nonetheless a significant one. And the Agency's role should become more concrete as Phase II components give added reality to some of those structural reforms, in particular through support for the *Procuraduría*, the *Fiscalía* and the *Defensor del Pueblo*.

In time it will be possible to assess along several dimensions the extent to which fairness has increased or decreased. For one thing, decisions are subject to an appeals process, where their fate should give some indications of fairness or its absence in the system. Second and perhaps equally importantly, decisions are reviewed in the personnel evaluation process that determines

²¹ On the other hand, procedural standardization in Colombia is hobbled by a presidential practice (sanctioned by the Congress) of issuing decrees having the force of law, which then compete with the national Criminal Procedure Code and in some cases contradict the Constitution. Fairness could be hard to achieve under such circumstances.

judges' retention and promotion. Finally, the *Procuraduría* office's oversight authority in the human rights area should (assuming that it is exercised) help considerably to ensure fairness. But for the present, all that can be said is that a number of important conditions for enhancing judicial fairness have been put into place and that more will follow in Phase II.

Predictability. If a justice system is to be effective over the longer term in any serious fashion, an absolutely essential requirement is that it be able as a matter of predictable routine to punish behavior that the state prohibits, with the key phrase here being "predictable routine." Perhaps it is easiest to define this concept in terms of the Colombian justice system itself, which until very recently practiced the opposite: terrorists and assassins of all types - narco-traffickers, guerrillas, *sicarios*, death squads - enjoyed an almost complete freedom to work their will on the citizenry, the condition referred to earlier in this essay as *la impunidad*. In a sense, then, there has been a kind of predictability, but it has been the certainty that few if any criminal malefactors would ever be brought to book.

To the extent that the Public Order courts, working with the new *Fiscalía* system and newly trained investigators, achieve a level of performance at which they can prosecute and imprison terrorists of all stripes, that segment of the justice system will have achieved predictability.²² The 70% conviction rate in the revamped Public Order courts surely helps here, but the courts can only convict those who are arrested and against whom convincing criminal cases can be made, and there are still unacceptable numbers of terrorists at large, even if their enjoyment of *la impunidad* has been somewhat compromised by an improved justice machinery. Thus court modernization, enhanced investigative capacity and the improvements brought about by structural reforms (creating the *Fiscalía* office and upgrading the *Procuraduría* office) will be necessary as well to achieve predictability in the criminal justice system.

Several recent developments, however, have brought the whole effort to achieve predictability under a very serious cloud in Colombia. These include Pablo Escobar's escape from prison in July 1992, the assassination of a Public Order court judge in September 1992, and the increased guerrilla violence of November of the same year. The importance of these setbacks to LSD in Colombia will be taken up in more detail shortly.

²² As for predictability in the short term, though, there is much uncertainty as to how the separation of the investigative/prosecutorial function that formed the rationale for the *Fiscalía* General will operate. The *Fiscalía* just began operations on 1 July 1992, so it will be some time before the new dispensation has a sufficient track record for achieving predictability.

Access. Article 229 of the new Colombian Constitution guarantees access to the courts by every citizen, a declaration that is buttressed by a Criminal Procedure Code declaring that defendants and suspects are entitled to legal counsel, to be provided by the state if necessary for indigent persons. This theoretical access should be enhanced in actual terms during Phase II, as the support provided to the *Defensor del Pueblo* office takes hold, but that LSD component has been postponed until the third and fourth years of Phase II, so it will be some time before any assessment would be appropriate.

In the meantime, the issue of access to due process for defendants is a serious one, at least potentially. The new system of Public Order courts, the creation of the *Fiscalía* and the upgrading of investigative capability are greatly fortifying the prosecutorial function in Colombia, but there has been no corresponding effort thus far on the defense side. This concern for strengthening the prosecution is surely necessary in a country where homicide is the leading cause of death, and the CDIE team found little evidence that due process for defendants was being abridged by these reforms, but it should be stated directly that the risk of such abuse is definitely there, particularly in view of Colombia's unhappy previous record in the human rights area. The Phase II project designers showed an awareness of this risk by building into the project support for the *Procuraduría General* and *Defensor del Pueblo*, and these institutions may prove able to reduce the risk to acceptable proportions (it can never be totally eliminated in any system), but this remains to be seen. At the very least the possibility certainly exists for the A.I.D.-supported reforms to have a negative impact on access to the legal system.

There has been some contribution from LSD's training and research components toward enhancing access through alternative dispute resolution mechanisms. Several of the FES-sponsored studies focused on conciliation mechanisms, especially through police agencies and civic organizations. In addition, LSD has sponsored some training for conciliators. This effort has been highly successful in its first step, which is to get cases out of the regular court system and into alternative channels. In 1991 (its first year of operation), some 480,000 cases were transferred over to police inspectors for conciliation. The next step has proven a bit slower, however, for less than 8,000 of these cases were actually conciliated. Clearly it will be some time before it becomes possible to determine whether this new channel does in fact provide greater access to the legal process.

Linkages between LSD program purposes. In addition to causal linkages between project outputs (Group II in Figure 1) and purposes (Group III), there exists a similar relationship within the bundle of LSD program purposes, for increased efficiency does have some effect on the other two purposes, as is indicated by

the dotted lines in Group III of Figure 1.²³ Efficiency in the criminal justice system can be considered a prerequisite for fairness and predictability, in that a system bogged down by huge backlogs and long delays will have immense problems in achieving either fairness or predictability. "Justice delayed is justice denied" in the traditional axiom is as true in Colombia as it is anywhere else. An expeditious processing of cases, in other words, is essential to produce fairness and predictability in the criminal justice system.

Likewise a certain minimum of efficiency is necessary to assure access to the system for all citizens. Defendants may be guaranteed the right to counsel and be accorded due process in being tried, but if they spend months and even years in prison awaiting trial as is now the case (often completing the equivalent of their sentences even before undergoing trial), those rights are in effect meaningless. The same hold true for the conciliation systems that have been set up - a greater degree of efficiency in processing will have to be attained before it can be said that the parties involved in the 480,000 cases transferred out of the regular courts into conciliation mechanisms in 1991 have realized meaningful access to justice.

Legitimacy. When citizens accept the state and its justice system as valid and worthy, they accord to it the moral and practical right to manage judicial affairs. They perceive the system to have the right to rule in such matters and they act accordingly. As noted earlier, there are three components to the concept of legitimacy: credibility; support; and reliance.

Credibility. For any justice system the aged dictum holds true that "justice must not only be done but must be seen to be done." Even if the Colombian system does objectively improve its fairness, access, etc., these achievements will be of little long term value unless citizens perceive that such improvements have taken place and that they have a criminal justice system more worthy of their trust and confidence. And it is only when significant progress has been made at attaining the program purposes of greater efficiency, fairness, predictability and access that it will be possible for public perception to view the system as more legitimate.

For Colombia, achieving credibility is a tall order indeed, particularly so in view of its long history of violence, impunity for criminals (*la impunidad*) and human rights abuses visited upon its citizens. It is certainly possible that the LSD enterprise and concomitant GOC efforts in the end will not prove capable of increasing the criminal justice system's credibility. In any event, it is too early at present to expect any improved credibility to have resulted from LSD activities. But as Phase II

²³ LSD program purposes could be divided into two parts in Figure 1, so that efficiency comes prior to the other elements, but this seems an unnecessary added complication to an already elaborate model.

moves on, it will be eminently feasible to track public views of the criminal justice system by utilizing the country's highly sophisticated public opinion polling capability. There is abundant evidence of the low esteem in which the system is presently held, and this can serve as baseline data, so that any improvements should be easy to detect.²⁴ Accordingly, credibility may well prove to be the simplest aspect of LSD purposes/goals to measure.

Support. The perception of legitimacy by itself will not be enough to make a justice system legitimate; citizens must also support that system by obeying its rules or laws. Whether they follow the law more because they honor it (e.g., refrain from taking vengeance on a rapist because they think the state should and will take on that task) or because they fear it (e.g., pay their taxes from concern over being caught) is not as important as that they do in fact obey the law. In most systems, after all, people obey the law from a mix of both these motives.

Theoretically, measuring support for the justice system should be reasonably straightforward, in that one simply need observe the statistics on incidence of crime: decreased crime means more citizen support for the system and vice versa. In practice, of course, things are much more complex; do statistics reflecting increased incidence of criminal behavior indicate less support for law (that is, more crimes committed), or do they show better reporting procedures, data gathering, etc. (such that a higher percentage of crimes actually committed show up in statistical measures)? This is an issue that has long plagued the American justice system and attempts to analyze it, and there is no reason to think that similar difficulties won't exist in Colombia. Even so, it could be speculated that the decrease in narco-violence in Colombia over the last couple of years does indeed indicate a greater support for the justice system. For a diminution of other forms of violence to show up in the crime statistics will undoubtedly be a longer process.

Reliance. Support might be called the negative side of legitimacy, in that those who support the system will refrain from illegal activity. Reliance on the other hand could be called the positive side of legitimacy, for it indicates the extent to which people actively use the system. Reporting crimes to the police (thus reflecting a belief that the system will be able to appre-

²⁴ For instance, in 1986 more than 85% of the respondents in a nationwide poll thought that Colombian judges did not apply the law equally to all citizens, while fully 88% thought that at least some judges could be bribed (Franco and Lonsde 1986: 32-33). On a more hopeful note, while less than 14% of respondents in another national survey felt positively affected by the new Constitution after its first year in effect, some 65% said it was too soon to tell how it would work (*El Tiempo* 1992b).

hend malefactors and bring them to trial) would be one critical gauge here.²⁵

Using alternative dispute resolution mechanisms (as opposed to taking direct action in the belief that the traditional procedures are too slow or useless) would be another measure of reliance. If the new procedure is perceived as effective and fair, once substantial numbers of the 480,000 cases transferred to it are resolved, people will likely come to rely on it quite extensively.

Linking LSD to democracy more generally

A.I.D.'s policy paper on *Democracy and Governance* explicitly sees improving judicial systems as a component for building democracy, citing "effective and impartial enforcement of laws by an independent judiciary" as "critical" to the democratic process (USAID 1991b: 7; also 8-9). In the CDIE model illustrated in Figure 1, greater legitimacy in the justice system of a country leads to a strengthened democracy.

If democracy is to endure in Colombia, it is essential that the justice system be characterized by credibility, support and reliance, none of which has rated very high in recent years. Thus far, while there has been some significant progress in the LSD sector, as has been shown in the preceding paragraphs, it probably cannot be said that the justice reform program has yet had any significant impact on the "meta-goal" of democratization. Any impact here will be a good while in coming. A.I.D.'s *Democracy and Governance* policy paper posits (USAID 1991b: 15) that "[S]upport for democratic institutions is necessarily long-term. Results cannot be expected within only one or two years." For the Colombian justice system, it may well take a good bit longer than that.

III. Attribution

Even under the best and most clear-cut circumstances, attribution is difficult to ascertain. Project environment, predisposition of intended beneficiaries, exogenous intervening factors -- all these play a significant and even dominant role at different times in determining whether any A.I.D.-assisted enterprise succeeds or fails, and when it succeeds they may weigh variously more or less in accounting for that success.

²⁵ Paradoxically, to follow the logic of the previous paragraph in the text, greater reliance on the criminal justice system (e.g., reporting rapes to the authorities in the belief that action would be taken) could lead to the impression of lower support for it (in this case, the total number of rapes appearing in the national statistics would increase). The example here assumes that rape has traditionally been underreported in Colombia as in other countries.

In the business of improving the administration of justice, all these problems are multiplied several fold. Did a structural reform occur because of A.I.D.-supported intervention, or was the crucial factor that relevant host-country officials were ready to move on the issue and would have done so even in the complete absence of any A.I.D. role, in which case the most that could be attributed to A.I.D. is that it facilitated that movement perhaps a little sooner than would otherwise have been the case? This is the sort of question that bedevils the quest to determine attribution here.

Still, some assessment of attribution can be made, and in what follows this issue will be explored with respect to LSD's major achievements in Colombia.

Public Order courts. In the criminal justice environment prevailing at the end of the 1980s, the GOC was faced with a choice between taking drastic measures to restore its authority and surrendering to the terrorism then threatening basic public order. It was in this atmosphere that the Public Order courts were revamped to include all their special features such as anonymity for judges and witnesses, extra protection for court personnel and the like. What was the LSD role here? The LSD enterprise certainly contributed significantly to the Public Order courts, supplying physical protection for judges, systematization technology for the courts and an improved investigative capability upon which the judges could draw. And of course much of the thinking that went into building up the Public Order courts arose from the FES-generated activity that ensued from A.I.D. sponsorship.²⁶

But LSD was only a part of the Public Order courts reform. The NAS program contributed far more in the way of physical protection to judges (armored cars, bullet-proof vests, etc.) than did LSD, and probably even more important was the policy dialogue headed by the US ambassador, who was primarily responsible for promoting the counter-narcotics agenda that far overshadowed all others on the USG policy agenda. Thus while LSD can take some credit for the Public Order court reforms, much of that credit must be shared with the NAS program, the US ambassador in Bogotá and of course the compelling urgency of the systemic crisis itself along with the GOC's determination to take necessary steps to deal with it.

Modernization. Other USG agencies were not involved in the *sistematización* undertaking, nor was there much institutional support from within the GOC, so the attribution issue is much more clear. For the showcase pilot project in Itagüí, LSD can claim most of the credit for what has happened, though it would have to be shared with the business community there, which pro-

²⁶ The revamping of the Public Order courts was accomplished largely by presidential decree, preceding the new Constitution by some six months, but was definitely a part of the overall restructuring effort.

vided financial and moral backing to the endeavor. For the modernization efforts elsewhere that were supported through FES (mainly in the appellate courts), LSD can claim a good deal of credit, although as indicated earlier these activities were much less ambitious than those at Itagüí. Unfortunately, though, the fact that no evaluations have been done for any of the modernization schemes means that it is hard to say exactly what it is that LSD can claim this credit for.

Enhanced investigative capability. Attribution is also reasonably clear here, in that the training provided by ICITAP and directed at improving investigative skills in the various police forces was funded by A.I.D. in Phase I. The Phase II training will also be funded by A.I.D., though ICITAP will provide that training with more administrative autonomy than was the case in the first phase. The *Fiscalía General* created under the new Constitution to be the principal criminal prosecuting agency will depend heavily on an enhanced investigative capability, and thus LSD can claim a good part of the credit for whatever improvements occur in this regard.

Knowledge from analytical research. A.I.D. can take a large share of the credit for the improved knowledge of the justice system in Colombia that has resulted from FES-sponsored research in Phase I. This knowledge was not built on a vacuum, to be sure, in that a significant and well-proven justice system research capability existed in Colombia prior to LSD in the form of such organizations as the *Instituto SER* and *Asesorio y Gestión* which carried out the FES-supported research. But it was the contribution of LSD to build on that capability to produce analyses that would inform and guide justice system reform in Colombia.

Improved jurisprudential base. LSD's Phase I initially upgraded judges' law libraries, and, when this proved less effective than hoped, proved able with guidance from the FES Advisory Council to work on the jurisprudence network. Attribution is reasonably clear here.

Structural reform. As noted above, given the exigencies of the criminal justice situation, the GOC simply had to take drastic measures if it were to retrieve a viable and sustainable public order in Colombian society. And the major credit for the fundamental structural reforms undertaken during President Gaviria's administration must go to him and his principal aides. But that is not to say that LSD did not play a critical role in this process along several dimensions:

- In the FES advisory council LSD provided a key arena for discourse among previously isolated major players in the criminal justice system.
- The steady nurturing and cultivation of the whole reform process by the A.I.D. representative was essential in moving it along.

- A number of the analytical studies supported by the FES advisory council served as inputs for key aspects of the new reforms.
- An LSD contractor offered advice and counsel to the writers of the new Constitution, even supplying drafts of what later became sections of that document.

IV. Recent developments in Colombia

After the CDIE team departed Bogotá in early July 1992, three things happened that have placed the whole LSD enterprise there in considerable doubt. Even taken singly, each is of sufficient gravity as to raise hard questions about the legal system reform effort in Colombia, and when considered collectively, they raise serious concerns as to whether the LSD effort can eventually succeed at all.

The Escobar escape

First, there was the escape of the notorious cocaine drug trafficker Pablo Escobar from prison on 22 July 1992, followed by a resumption of the kind of narco-terrorism prevalent in the late 1980s and by embarrassing revelations about his luxurious lifestyle while under incarceration. To be sure, he is only one prisoner, but his prominence in the drug trade and the circumstances of both his imprisonment and his escape were so egregious (and highly publicized) that the GOC's whole judicial reform endeavor has been badly compromised.²⁷ He was the most well known of the narco-traffickers who surrendered themselves in 1991 when it became clear that the GOC would not extradite them to the United States. So although the luxurious conditions of his special prison at Envigado were widely known and it was widely believed that he continued to direct his cocaine network, it could be asserted by the GOC that he was incarcerated and that the Gaviria administration had seized the initiative.

The GOC's hope was apparently that by neutralizing Escobar and other major narco-traffickers like the Ochoa brothers it could then concentrate on bringing public order to the rest of the society, i.e., the guerrilla groups, death squads, lesser narco-traffickers, *sicarios*, etc. Thus the principal strategy for solving the crisis of social order lay not in extradition but in

²⁷ Because the press in Colombia has enjoyed an admirable freedom, the coverage of Escobar's prison conditions and escape was intense and detailed (see for instance *Semana* 1992b). Actually, it had long been widely understood that Escobar had received extraordinarily lenient treatment in prison (see e.g., Brooke 1991), but before his escape the GOC did not have to take such accounts seriously.

constitutional reform.²⁸ And initially, this approach appeared to enjoy some success, as most of the narco-terrorism that had plagued the country dried up after Escobar and other drug chiefs entered prison. The GOC proceeded with its judicial reforms, most especially the Public Order courts, and the situation appeared to be coming under control.

But with Escobar's escape, it became obvious that he had not been neutralized, that his imprisonment had never been a serious matter, that he had been actively involved in directing his Medellín narcotics syndicate from prison, and that the days of impunity for narco-terrorists might be returning. In sum, it became clear that the GOC's justice system reform strategy had some very major flaws.

The assassination of the juez sin rostro

The second severe setback for LSD occurred on 18 September 1992, when Judge Miryam Roció Vélez was assassinated in broad daylight in Medellín while driving to her office. Judge Vélez was one of the *jueces sin rostro* ("faceless judges") of the Public Order courts, who was conducting the case involving the 1986 assassination of Guillermo Cano, the publisher of *El Espectador* (one of Bogotá's two leading newspapers), reportedly by the Medellín drug cartel. As a *juez sin rostro*, Judge Vélez conducted her cases anonymously, made her courtroom appearances behind a one-way glass, used a voice-distorting microphone system when speaking in court, and was driven to and from her home in an armor plated vehicle accompanied by armed bodyguards.²⁹

Ever since the establishment of the new Public Order court system in early 1991, it was widely believed that the anonymity of the *jueces sin rostro* could be penetrated with sufficient determination and money. And on occasion it was reported in the press that such a penetration had indeed occurred.³⁰ But as long as no court personnel were harmed, such stories could be denied. With the assassination of Judge Vélez, however, official denials lost all credibility. The entire foundation of the Public Order courts had been severely compromised in the most violently public way.

²⁸ This was President Gaviria's argument at the time the 1991 Constitution was enacted in July 1991, as outlined in his essay published in the *Washington Post* (30 June 1991). In the course of writing the new Constitution, extradition was scrapped as a mechanism, in return for which Escobar and other narco-traffickers agreed to surrender themselves to the judicial system.

²⁹ See the extensive analysis of the assassination, "Regreso al terror" ("Return to terror") in *Semana* (1992c).

³⁰ See for instance the story "Narcos amenazan a jueces sin rostro," in *El Tiempo*, Bogotá's largest daily, 16 June 1992 (1992a).

The re-emergence of the guerrilla threat

A third blow came in early November 1992, as the two main guerrilla groups launched a series of attacks on government forces. In recent years there had been a significant decrease in guerrilla activities, as several groups negotiated with the GOC to demobilize themselves and re-enter civilian life, most notably M-19 (*Movimiento 19 de Abril*), which participated in the constitutional convention of 1991 and was included in President Gaviria's cabinet. Since the M-19 accord, the two major holdout groups, FARC (*Fuerzas Armadas Revolucionarias de Colombia*) and ELN (*Ejército Popular de Liberación*), had been conducting similar talks off and on with the GOC.

But in October 1992, responding to guerrilla attacks, the GOC suspended a scheduled renewal of the talks, and the guerrillas riposted by dynamiting oil pipelines, overrunning police outposts. President Gaviria thereupon declared a state of emergency and issued a number of decrees aimed at weakening the guerrilla groups (See Brooke 1992; Speck 1992b, 1992c). The guerrillas, generally estimated to number around 8,000, had by the early 1990s been set adrift in the post-Cold War world, abandoned by their former supporters both abroad and at home. They had come to subsist largely through extortion and protection efforts, mostly directed against foreign oil companies developing new oilfields located in guerrilla territory.³¹ Hopes ran high that they would follow the M-19 path and reach an accord with the GOC, but the events of November belied any such possibility, at least for the immediate future. Instead, the prospect was for guerrilla terrorism that would rival the renewed narco-terrorism as a cause of crisis for both state and society in Colombia.

Implications for LSD

The combined effect of these three developments is that a concerted attempt at reforming the justice system and one that was beginning to show some promise of succeeding has been dealt a heavy blow. Clearly there were signs of success in each of these areas by the early summer of 1992. First, although there was doubt about the severity of Pablo Escobar's incarceration, at least he and a good number of other major narco-traffickers who had surrendered were under watch, while others like the notorious Ivan Urdinola were slowly being rounded up.³² There was even some evidence that the GOC's approach to narco-traffickers was

³¹ One of the presidential decrees was a threat to ban foreign corporations that paid protection money to guerrilla groups.

³² The Urdinola brothers were especially infamous for their chain saw murders of those suspected of disloyalty or opposition. See Farah (1992).

beginning to be perceived as effective.³³ Second, despite stories and rumors that the anonymity of the faceless judges had been pierced, none had been assassinated since the new program had gone into effect. And third, even though the GOC's negotiations with the holdout guerrilla groups kept collapsing, they also kept reopening, giving hope that FARC and ELN would follow the path taken earlier by M-19 to rejoin the political system. In short, there was reason to believe that the GOC was slowly gaining control of the terrorist situation.

By the end of 1992, it was scarcely certain that the series of setbacks would doom any chance for LSD in Colombia. The GOC had proved itself equal to moving against the daunting challenges to civil order that were posed by the late 1980s, and it may well do so against those now threatening in the early 1990s.³⁴ Certainly much of the reverse suffered during the July-November 1992 period was to a certain extent symbolic rather than real. But then a large part of the political universe is symbolic, after all, and in this sense the damage done to LSD in Colombia must be counted as real. It will be a hard task indeed to put things back together again after these events and get LSD once again on track. The generalizable lesson for A.I.D. would seem to be that not only is LSD a sensitive area to work in but it can also be a precarious one, vulnerable to sudden reverses from the wider political arena of the host country.

V. Key issues emerging from the LSD experience in Colombia

Stemming from the CDIE review of LSD in Colombia, there are a number of issues that relate to the Agency's overall enterprise in this subsector of its Democracy Initiative. In the present paper, our purpose is to raise these issues and devote a very brief analysis to each, but not to attempt any definitive resolu-

³³ An opinion poll taken in May 1992, after Escobar had been in prison for a full year, found that while 68% of the respondents said they had not believed he would still be in prison after a year, fully 50% now believed that the justice system was more capable of judging narco-traffickers (*Semana* 1992a). A poll taken after the Escobar escape would almost surely show a decline in the latter figure.

³⁴ For example, an opinion poll taken after President Gaviria's first round of anti-guerrilla decrees in November 1992 showed 64% of respondents backing the measures generally (*Semana* 1992d), indicating that in terms of the CDIE's LSD model (cf. Figure 1), the GOC was receiving some popular support and hence legitimacy for its efforts. Similarly, an opinion poll commissioned by *El Tiempo* (1992c) found almost 65% of respondents believing that "a strong hand is the best solution" to the guerrilla subversion and 61% feeling that stronger measures were needed than the decrees declared thus far. See also Podesta (1992).

At the end of 1992, *Semana* (1992e) and *El Tiempo* (Alvarez and Hernández 1992), which are the premier newsmagazine and newspaper of the country, both selected Gustavo de Greiff as the "Person of the Year" for his work in setting up and directing the new Fiscalía General. In *Semana's* words (1992e), he was able "to restore credibility to Colombian justice."

tion to or pronouncement on any of them at this initial stage. Subsequent CDIE field studies of the Agency's LSD experience will amplify and deepen the analysis of these issues, refining them as the studies proceed toward the evaluation synthesis that will constitute the last step in the process.

Supply and demand

Should LSD focus more on improving the justice system itself or on enhancing access to that system? This fundamental question keeps resurfacing in different forms: supply of legal services vs demand for them; a "top-down" vs a "bottom-up" approach to judicial reform; strengthening justice institutions vs building NGOs that will demand and promote improvements in those institutions. In the end, of course, amelioration and strengthening of a country's legal system can only come about if both are present: institutions must improve and citizens must be interested in their improving. But foreign assistance cannot do everything in any sector; priorities must be established so that scarce funding and management energies can be most fruitfully engaged. In the LSD sphere, some choices must be made between addressing supply issues and dealing with those of the demand side.

In the Colombian case, USG policy, both as pursued by A.I.D. and other constituent elements of the American establishment there, has focused almost exclusively on the supply side of the justice system. Strengthening institutions has been the principal priority, whether it has been judicial entities as the Public Order courts and the Fiscalía General or other governmental agencies like the police and army in their ability to interdict narcotics traffic. Little care was given to promoting demand for a better justice system, say by supporting human rights groups or legal assistance activities.³⁵ And even the attention that was devoted to the demand side in the original Phase II project paper was downplayed when project components on public perception of the justice system, public education and the Public Defender's office were postponed until the third and fourth years (cf. Table 1).

It could be argued in defense of this approach that there was relatively little need to work on the demand side of the justice system equation, for it was already there. Colombian elites at the political level (including demonstrably the president of the country) were clearly very much committed to a fundamental judicial reform as the only way to salvage political order amid the chaotic violence of the 1980s. And for its part, the public was quite obviously disaffected and alienated from the judicial

³⁵ An exception here would be the alternative dispute resolution mechanism structure set up during Phase I, which removed close to 500,000 cases from the regular court system. When this structure begins to make headway in resolving these cases - and assuming that it is perceived as being fair and predictable in its resolutions - people should start bringing their cases there instead of to the regular courts, or in terms of the model illustrated in Figure 1, people will come to support and rely on the new system.

status quo, and accordingly could be assumed to favor serious system reform.³⁶ It was enough, in other words, to concentrate on the supply side, improving the appropriate GOC institutions.

Such an argument quite likely would have proved convincing, had the progress made up through June 1992 continued on indefinitely. The reverses suffered in July and afterward, however, make it appear that some attention to the demand side is probably going to be necessary if judicial reform in Colombia is eventually to succeed. If the citizenry is to believe in, support and rely on the justice system -- or in other words to accord it legitimacy -- they will have to be convinced that it is efficient, fair, predictable and accessible, all of which would now have to be regarded as problematic.

It should be noted that it is only with the benefit of hindsight that the lack of attention to demand can be considered a problem. When the CDIE team visited in Colombia in June-July (just before the Escobar escape), it appeared to the team and to almost all of those interviewed that the LSD program had made the right choice in allocating most project resources to the supply side. It is only "the conspiracy of events" that now makes clear the greater role that demand should play in reforming a justice system.

In other systems, where there is not such a pronounced elite commitment to change (and perhaps not such a high level of popular dissatisfaction with the present justice setup), the temptation to work only on the supply side might not be so compelling. This question will form an issue to be examined in future CDIE studies.

Incremental vs structural reform

Can legal systems be improved bit-by-bit in an incremental fashion, or is fundamental reform needed to bring about any significant advancement? It is exceedingly doubtful that anything less than the serious structural reforms undertaken by the Gaviria administration would have had any significant impact on the Colombian justice system. The endemic and longstanding problems of violence, narcotics and a decrepit justice system plagued by corruption were altogether too profound for any incremental reforms to have accomplished very much.

Fortunately, the very gravity of the crisis confronting the country galvanized the national leadership to undertake a fundamental restructuring program. The policy dialogue and advice offered by USG officials in Colombia may have helped move the reforms along a bit faster or deeper, but by all accounts the GOC's motivation

³⁶ Cf. note 24 above. In discussing demand, we are omitting here for the moment the human rights and due process issues, which were included in the Phase II project but (as noted in the text above) were postponed until its third and fourth years.

came from within its own leadership. After the setbacks in the latter half of 1992, this high level of elite commitment will be even more necessary to re-establish a momentum for LSD in Colombia.

Perhaps in other countries there might be a real choice between reform at the margins or the core of the justice system, but in Colombia it seems abundantly clear that the latter path was the only viable one. The question itself, however, should be raised in future CDIE studies of LSD.

Judicial efficiency and human rights

One paramount consideration whenever the topic of strengthening a criminal justice system arises is the potential impact on individual criminal and civil and more broadly human rights. In the United States, for instance, exhortations to be more lenient toward law enforcement agencies in applying the Fourth Amendment to the Constitution (against unreasonable search and seizure) are invariably attended by comparable arguments demanding protection of individual rights against overzealous police authorities. Similar debates surround the issues of due process rights for arrested and accused persons in the American criminal justice system.

In Colombia, the stakes are a great deal more intense. Even a casual acquaintance with the country's recent history reveals at once the powerful role violence plays in the society. Attempts to deal with the violence unleashed by the various guerilla movements and narco-traffickers in recent years has led to yet more violence at the hands of the state, with military and police units routinely abusing, torturing and killing citizens more or less as a matter of course.

And it is not just ordinary citizens who are subject to the resulting insecurity. High level government officials like ministers and presidential candidates have been regularly assassinated, as have more than two hundred judicial officials over the last decade. Businessmen are frequently kidnapped for substantial ransoms. Foreign diplomatic officials, who in other countries are encouraged - even admonished - to mingle as much as possible with the people and see as much as possible of the host country, are confined to Bogotá, advised to stay indoors and subjected to security safeguards that in other places would be deemed paranoid to the point of obsession. Colombia, in short, is a very dangerous place for everyone.

With its new constitution and criminal procedure code, Colombia has begun the monumental task of bringing its justice system under control. But at what possible risk to due process and human rights? It can certainly be argued forcefully that the special Public Order courts were necessary, with their anonymous judges and witnesses, special armored cars for court personnel, and evidence that need not necessarily be made available *in toto*

to the defendant. Likewise it can be argued strongly that the creation of a *Fiscalía General* office was also needed to focus on the prosecutorial and investigative functions that had fallen so far behind the pressing needs of the times. And surely the court systems with their antiquated, torpid record-keeping systems needed modernizing. Finally, it is admittedly unrealistic to expect a police and military establishment continually under stress and assault from every side to observe all the standards of due process that can be expected in calmer countries.

Still, might the remedies at some point prove stronger than needed to meet the problems? The CDIE team did not find any solid evidence that the new systems had given rise to an increase in human rights violations. In fact it could be the case (although the team does not know this either) that the newly strengthened *Procuraduría* office is now more vigorously pursuing such violations, which do continue to occur with distressing frequency even today.³⁷ The point here, however, concerns the potential for abuse. The definition of "terrorism" (any act threatening civil order) used by the special Public Order courts is sufficiently vague that future governments could use it to cover a very wide range of activities. And the new constitution gives the president very substantial powers to issue executive decrees affecting the criminal justice system.³⁸

The CDIE team found many in the U.S. Embassy staff in Bogotá to be quite concerned with human rights issues. Officers in the political section in particular thought such matters to be important. And the Phase II LSD project does accord a prominent place to rights issues, in that it does call for significant

³⁷ See, for instance, the Amnesty International report for 1992, analyzed at some length in the Bogotá daily *El Espectador* (Rincón 1992). See also the U.S. State Department's annual report on Human Rights for 1991 and the *Procuraduría General's* 1991 report on human rights. The CDIE team did find a significant concern on the part of various human rights groups in Colombia that the new system posed serious risk of abuses.

³⁸ On the day before the CDIE team left Bogotá, for instance, President Gaviria issued a decree that temporarily voided the Criminal Procedure Code's requirement that the Public Order courts must bring defendants to trial within 120 days (extendable to 180 days) or release them. The government's case here was that many of these defendants were too dangerous to be let loose, which might well be true, but could such a move also at some future point justify indefinite preventive detention at the whim of the state? Later, in November 1992, following the guerrilla offensive earlier that month, the President issued a set of decrees designed to strengthen the hand of the state in pursuing terrorism (Speck 1992b and 1992c).

It is worth pointing out that in Peru a somewhat similar situation prevails with respect to special courts and the potential for abuse. President Alberto Fujimori suspended the constitution with his "autogolpe" coup in April 1992 and promulgated new laws in which *habeas corpus* rights were severely curtailed and terrorism received a greatly broadened definition, with those accused to be tried in secret courts where the identities of judges, prosecutors and court employees would all be hidden (Kerr 1992; see also Nash 1992). Few outside observers doubt that the scope for human rights abuse in Peru today is immense.

assistance specifically to the *Procuraduría General* (which is charged with investigating human rights violations) and to the *Defensor del Pueblo*.³⁹ In addition, the ICITAP training provided to investigative officers includes a distinct and substantial human rights component.

The issue then is not inattentiveness on the American side. Rather it is simply the very broad point that restructuring a criminal justice system to strengthen public order poses some serious potential risks to due process and human rights. Public order is surely important (security against terrorist assault could be counted a human right after all), but so are due process and human rights. At present Colombia is searching for the right balance between the two. There is no indication that the new justice system has given rise to greater abuse of human rights. But the potential is there to a greater extent than before, and at some future time that potential could become reality. Given Colombia's past human rights record, this is a matter that must be monitored closely as Phase II proceeds. In particular, the human rights issue may become more salient as the GOC reacts to the setbacks to its justice reform program that occurred in the latter half of 1992.

We emphasize the point at some length here, because AOJ programs in other countries may well find themselves involved in restructuring criminal justice systems in an atmosphere of civic violence and breakdown of public order. Terrorism inspired by narco-traffickers, guerrillas, death squads and the like are scarcely unique to Colombia (though they may be more acute there), and in other countries ethnic violence may well get added to this volatile mix. Desperate situations elsewhere may also call for strong measures to combat them, and human rights will always be at risk in such situations.

Judicial efficiency and human rights need not be a trade-off. Indeed, they should be mutually reinforcing, as a more effective justice system becomes better able to safeguard human rights and the active presence of a strong human rights establishment helps ensure that increased judicial efficiency stems from genuine improvements in the system and not simply from speeding up the flow of processing. But the risk of the one coming at the expense of the other is there, and accordingly such a danger must be carefully monitored.

Convergent agendas between donor and host country

It is an old maxim that foreign assistance efforts best succeed when American and host country policy priorities are congruent. When they diverge, success tends to be elusive. In combatting

³⁹ The support for the *Defensor del Pueblo* office has been postponed to the third and fourth years of the Phase II project, however (see Bloom memo of 19 June 1991, p. 5).

corruption, for instance, there are any number of cases where A.I.D. has urged projects in bureaucratic reform and restructuring and has even begun such endeavors with the ostensible cooperation of the host country government but has seen the efforts come to nothing because the latter was never seriously interested in reducing venality in the first place. Or how many agricultural credit projects have foundered and collapsed because the host country government never really wanted to manage them honestly but instead saw them as conduits for building political patronage in the countryside? On the other hand, family planning projects are likely to succeed when the host country government makes a serious commitment to bringing down birth rates, and structural readjustment efforts have more probability of fulfillment when the host country government is itself seriously concerned about reducing bloated public payrolls and getting a higher return on its public expenditures.

But USG priorities and those of the host country government need not be exactly the same for a development effort to succeed. While an identity of priorities is surely the ideal, it can be sufficient that the individual priorities of the two sides run in the same direction - not pursuing identical tracks necessarily, but following essentially similar paths to the extent that a single broad development initiative can accommodate both.

It is the latter pattern that currently exists in Colombia. The first USG priority is the counter-narcotics enterprise, and within it interdicting narco-trafficking, as is clear from a glance at the total level of effort devoted to it within the US Embassy in Bogotá.⁴⁰ Within A.I.D. itself, the priorities are somewhat more complex, with counter-narcotics being only one of three LAC Bureau goals for its Colombia program, the other two being to support economic growth and to support democratic evolution. At the A.I.D. mission level in Bogotá, this translates into two strategic goals: supporting economic liberalization and improving the effectiveness of the justice system.⁴¹ The Agency's program in Colombia is but a small part of the total USG effort there, however, and it is that total effort that must be considered when analyzing how well American and Colombian priorities mesh together.

For its part, the first GOC priority is reducing societal violence, including narco-terrorism but also comprising the violence perpetrated by guerrillas, paramilitary groups, *sicarios*, etc. Its major domestic goal is to rescue a system in which homicide has become the leading single cause of death. Combatting narco-

⁴⁰ Eradication is currently rising in terms of level of effort, as poppy growing for heroin production (to meet changing tastes in the North American market) has been rapidly expanding over the last year or so, but the argument outlined here in the text remains the same.

⁴¹ These elements of the program structure are outlined most recently in the AID Colombia Action Plan for FY 1993-94 (USAID/Colombia, May 1992).

terrorism and its root cause in narco-trafficking is an important part of that goal, to be sure, but only a part.

Fortunately, these two overarching goals do converge in the U.S.-supported effort to reform the justice sector, a fact which goes far to explain the interest shown by the present GOC administration in A.I.D.'s justice reform project. It is probably not pushing the interpretation too far to suggest that USG support for justice sector reform helps considerably to demonstrate to the GOC that the United States is interested not only in drugs but also in helping Colombia solve what its leaders see as its major problem of terrorism. In short, a strong case can be made that LSD helps greatly to give credibility to the overall USG program in Colombia. If AOJ were dropped or seriously cut back, it is probably safe to say that GOC enthusiasm for the remainder of the USG effort would begin to wane, perhaps to a considerable degree.

This convergence is especially important given the elimination of extradition as a viable USG policy objective with the rewriting of the Colombian constitution in 1991 and the reality of continuing heavy cocaine exports to the United States in spite of much USG energy devoted to interdiction. In the end, the promise of a long-term solution to narco-trafficking that LSD represents may well prove to be the only solution that will be effective. It is not at all sure at this point that the justice reform approach can eliminate the threat that narcotics poses to American society, but in an environment in which there is no USG approach that is clearly succeeding quickly, it is best to have several strings to the policy bow.

The NGO as project intermediary

One of the reasons for selecting Colombia for this first CDIE assessment of LSD was that the program there had been implemented through an NGO, and it was thought that this experience might offer larger strategic lessons. What advantages might NGOs have as LSD intermediaries that would be lost in direct bilateral linkages between A.I.D. and host country governments?

As the evaluation proceeded, it became apparent that there were a number of advantages to using FES as an intermediary, at least some of which might well become a part of LSD efforts elsewhere.

- Neutral arena for host country dialogue. As observed earlier, FES provided a place for GOC justice system policymakers to come together, get to know each others' problems and work out differences between their agencies. The Colombian justice system has been severely fragmented between the Ministry of Justice in the executive branch and the *Rama Jurisdiccional* or judicial branch. And even within each of the branches various offices were often isolated from each other. Yet for any serious structural reform to occur, the

major players had to talk out their differences and compromise them. By offering a neutral ground free of turf" issues, FES contributed significantly to LSD progress.

- A facilitator for A.I.D.-GOC dialogue. By any account, A.I.D. involvement in such areas as narcotics and judicial restructuring has to be regarded as very sensitive, especially when constitutional reform gets into the picture as it did in this case. Fortunately, having FES as an intermediary allowed A.I.D. and the USG to have a significant input into these processes without the possible publicity and embarrassment to the GOC that a more direct A.I.D.-GOC relationship might have engendered. The FES arrangement allowed the American input to remain a part of the background scenery, which of course makes it difficult for the Agency to claim the credit it might feel is its due, but which also avoids the substantial risks entailed when foreign agencies get involved in fundamental government reforms.
- Host country continuity. During the five years (1986-91) of Phase I, there were eight Ministers of Justice, meaning that average time in office was less than a year.⁴² Other GOC members of the FES Advisory Board also came and went. But the board concept meant that when any given GOC member left others from different constituencies would stay, and the private sector members tended to stay on the board for much longer periods of time. Thus the Advisory Board could act as a steadying influence, preventing the erratic deviations of course that surely would have occurred if, for example, the Colombian Ministry of Justice had been directly administering the program.

VI. A.I.D. strategy choices for LSD: issues for future CDIE assessments

The CDIE assessment of the LSD experience in Colombia raises many implications regarding the causal connections linking program inputs, outputs, purposes and goals, as well as the "meta-goal" of democratization, as shown in Figure 1. In the discussion thus far, an attempt has been made to draw out and explain these connections (in sections II and III of the paper), and then to analyze them as key issues arising from the Colombian experience (section V). In this section, these issues will be stated

⁴² This pattern has continued. Between the time that the new Constitution went into effect in July 1991 and the time the CDIE field team wound up its field work in mid-July 1992, there had been three Ministers of Justice in office.

briefly as critical strategic choices to be explored in future CDIE assessments.

It should be emphasized that the list is a tentative one, and our anticipation is that it will be modified as the CDIE evaluation effort moves along, with new items added, current items reformulated and perhaps even some items merged into others or even dropped. Hopefully, by the time of the evaluation synthesis that will culminate this CDIE enterprise, these key issues will make a significant contribution to future A.I.D. strategy, most especially in the LSD sphere but also more generally in the Agency's Democracy Initiative.

Supply and demand for LSD

In a universe of scarce resources, should foreign assistance in the LSD sphere concentrate more on developing the supply of judicial services or on strengthening the demand for them? In the Colombian case and in the LAC region generally the preferred strategy has been to focus on the supply side, but a first look at the Asian region indicates that there it has been the demand side that has received more attention. Are there profound regional differences here that would dictate these different approaches? Or are they more a function of differing regional strategies emanating from the Washington bureaus? Would a more mixed approach be better at least in some country situations?

Incremental vs structural reform

In Colombia there was a very strong case to be made for fundamental structural reform as the basic LSD strategy. Given the severe crisis the justice system there was facing, tinkering at the margins would have been to little avail. But in most other aid-receiving countries, the judicial situation is considerably less dire, and a more incremental approach might well be better. What are the circumstances under which restructuring or incrementalism are to be preferred? Can the two strategies be blended (i.e., is there a continuum), or is it an either/or choice?

Judicial efficiency and human rights

Human rights and due process have never been strong aspects of the Colombian justice system, and the same is true of many if not most non-Western countries. To enhance the efficiency of the justice system under such circumstances is to put human rights and due process at even greater risk. What should be A.I.D.'s approach in these situations? How does the human rights/due process situation relate to the supply/demand strategic choice posed above?

Convergent agendas vs conditionality and dialogue

Success in foreign assistance is always easier when the donor and the host country have policy agendas that at least converge to some degree, even if they are not identical. In Colombia, the USG and GOC agendas did converge on narco-terrorism, even though the broader USG priority was counter-narcotics while that of the GOC was terrorism and violence of all kinds. Conditionality was not needed to push the Agency's LSD program, and the dialogue involved dealt more with coordinating the disparate parts of the Colombian justice system than with persuading the GOC to change policy directions.

But what of other countries where this degree of convergence is not so clear? To fundamentally reform a justice system is to deal with the core of the political system, perhaps even more profoundly than structural adjustment deals with the core of a country's economic system. Yet USG policy has pressed for political reforms in aid recipient countries, particularly in the human rights sphere, and a strong case can be made that conditionality should be an integral part of the Agency's Democracy Initiative (see e.g., Nelson and Eglington 1992). Are there limits here in the judicial reform area, or can it be subjected to policy dialogue and conditionality?

Host-country NGOs vs other project implementors

Choosing an implementing agency for an A.I.D. project would appear to be more an in-country management decision than a strategic issue. But as we have seen in this report, the use of FES as an intermediary had a significant impact on project outcome, quite beyond the details of subproject supervision, contract fulfillment, accounting procedures, etc. Was this a situation peculiar to Colombia, or can some conclusions be made more broadly regarding the use of NGOs as LSD intermediaries?

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